Supreme Court, U.S.
FILED
JUL 24 2003
OFFICE OF THE CLERK

No. 02-964

IN THE

Supreme Court of the United States

GEORGE H. BALDWIN,

Petitioner,

vs.

MICHAEL REESE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

KENT S. SCHEIDEGGER
Counsel of Record
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816

Phone: (916) 446-0345
Fax: (916) 446-1194
E-mail: cjlf@cjlf.org

Attorney for Amicus Curiae Criminal Justice Legal Foundation

41 pp

QUESTION PRESENTED

Has a state prisoner "fairly presented" his federal claim to the state courts, as that term is used in this Court's exhaustion and procedural default cases, when he presents the claim to the trial court in state post-conviction review, but his state appellate briefing neither cites the federal Constitution, nor cites case law based on the federal Constitution?

TABLE OF CONTENTS

Question presented i

Table of authorities v

Interest of *amicus curiae* 1

Summary of facts and case 2

Summary of argument 3

Argument 4

I

The exhaustion and procedural default rules are essential components of Congress's policy to limit habeas to a secondary role 4

A. History 4

B. Three interlocking pieces 7

C. Serious and meaningful appeals 10

II

The procedural default rule should be returned to its original status as a component of the exhaustion requirement .. 13

A. The rise, fall, and rise of the procedural default rule 13

B. The statutory language 20

C. The trouble with state grounds 24

1. Improper focus 24

2. Perverse incentives 26

D. Existing exceptions 27

E. Summary and application 28

Conclusion 30

TABLE OF AUTHORITIES

Cases

Acosta-Huerta v. Estelle, 7 F. 3d 139 (CA9 1992) 12

Amos v. Scott, 61 F. 3d 333 (CA5 1995) 26

Barefoot v. Estelle, 463 U. S. 880, 77 L. Ed. 2d 1090, 103 S. Ct. 3383 (1983) 4

Barr v. City of Columbia, 378 U. S. 146, 12 L. Ed. 2d 766, 84 S. Ct. 1734 (1964) 26

Bowen v. City of New York, 476 U. S. 467, 90 L. Ed. 2d 462, 106 S. Ct. 2022 (1986) 22

Brecht v. Abrahamson, 507 U. S. 619, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993) 4

Brown v. Allen, 344 U. S. 443, 97 L. Ed. 469, 73 S. Ct. 397 (1953) 6, 16, 20, 21, 23, 26

Caspari v. Bohlen, 510 U. S. 383, 127 L. Ed. 2d 236, 114 S. Ct. 948 (1994) 19

Castille v. Peoples, 489 U. S. 346, 103 L. Ed. 2d 380, 109 S. Ct. 1056 (1989) 10

Coleman v. Thompson, 501 U. S. 722, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991) 8, 10, 20, 25, 27

Commonwealth v. Johnson, 602 N. E. 2d 555 (Mass. 1992) 11

Darr v. Burford, 339 U. S. 200, 94 L. Ed. 2d 761, 70 S. Ct. 587 (1950) 6, 15, 16

Davis v. United States, 411 U. S. 233, 36 L. Ed. 2d 216, 93 S. Ct. 1577 (1973) 19

Davis v. Wechsler, 263 U. S. 22, 68 L. Ed. 2d 143, 44 S. Ct. 13 (1923) 28

De Meerleer v. Michigan, 329 U.S. 663, 91 L. Ed. 584,
67 S. Ct. 596 (1947) 16

Dowd v. Cook, 340 U. S. 206, 95 L. Ed. 215,
71 S. Ct. 262 (1951) 16

Duncan v. Henry, 513 U. S. 364, 130 L. Ed. 2d 865,
115 S. Ct. 887 (1995) 28

Ex parte Hawk, 321 U. S. 114, 88 L. Ed. 572,
64 S. Ct. 448 (1944) 6

Ex parte Milligan, 4 Wall. (71 U. S.) 2, 18 L. Ed. 281
(1866) 18

Ex parte Royall, 117 U. S. 241, 29 L. Ed. 868,
6 S. Ct. 734 (1886) 5

Ex parte Spencer, 228 U. S. 652, 57 L. Ed. 2d 1010,
33 S. Ct. 709 (1913) 13, 14

Ex parte Watkins, 3 Pet. (28 U. S.) 193,
7 L. Ed. 650 (1830) 5

Fay v. Noia, 372 U. S. 391, 9 L. Ed. 2d 837,
83 S. Ct. 822 (1963) 5, 6, 17, 18, 20, 21

Fields v. Calderon, 125 F. 3d 757 (CA9 1997) 27

Francis v. Henderson, 425 U. S. 536, 48 L. Ed. 2d 149,
96 S. Ct. 1708(1976) 19

Frank v. Mangum, 237 U.S. 309, 59 L. Ed. 969,
35 S. Ct. 582 (1915) 14

Harris v. Reed, 489 U. S. 255, 103 L. Ed. 2d 308,
109 S. Ct. 1038 (1989) 25

Horn v. Banks, 536 U. S. 266, 153 L. Ed. 2d 301,
122 S. Ct. 2147 (2002) 8

In re Bay Area Citizens Against Lawsuit Abuse,
982 S. W. 2d 371 (Tex. 1998) 12

In re Wood, 140 U. S. 278, 35 L. Ed. 505, 11 S. Ct. 738
(1891) 13

Irvin v. Dowd, 359 U.S. 394, 3 L. Ed. 2d 900, 79 S. Ct. 825
(1959) 17

Johnson v. Zerbst, 304 U. S. 458, 82 L. Ed. 1461,
58 S. Ct. 1019 (1938) 16

Keeney v. Tamayo-Reyes, 504 U. S. 1, 118 L. Ed. 2d 318,
112 S. Ct. 1715 (1992) 10

Lee v. Kemna, 534 U.S. 362, 151 L. Ed. 2d 820, 122 S. Ct.
877 (2002) 16, 28, 29

Lockyer v. Andrade, 538 U. S. __, 155 L. Ed. 2d 144,
123 S. Ct. 1166 (2003) 9

Meskimen v. Larry Angell Salvage Co., 592 P. 2d 1014
(Or. 1979) 11

Moore v. Dempsey, 261 U. S. 86, 67 L. Ed. 543,
43 S. Ct. 265 (1923) 14, 15, 23

Murdock v. City of Memphis, 20 Wall. (87 U. S.) 590,
22 L. Ed. 429 (1875) 24

Murray v. Carrier, 477 U. S. 478, 91 L. Ed. 2d 397,
106 S. Ct. 2639 (1986) 15

NAACP v. Alabama ex rel. Patterson, 357 U. S. 449,
2 L. Ed. 2d 1488, 78 S. Ct. 1163 (1958) 18

New England Tel. & Tel. Co. v. City of Franklin,
685 A. 2d 913 (N. H. 1996) 12

O'Sullivan v. Boerckel, 526 U. S. 838, 144 L. Ed. 2d 1,
119 S. Ct. 1728 (1999) 7, 8, 13, 14

People v. Stanley, 10 Cal. 4th 764, 42 Cal. Rptr. 2d 543, 897 P. 2d 481 (1995) 11

Peterson v. Maass, 882 P. 2d 1140 (Or. App. 1994) 11

Petrocelli v. Angelone, 248 F. 3d 877 (CA9 2001) 27

Porter v. Nussle, 534 U. S. 516, 152 L. Ed. 2d 12, 122 S. Ct. 983 (2002) 22

Prihoda v. McCaughtry, 910 F. 2d 1379 (CA7 1990) 27

Reese v. Baldwin, 282 F. 3d 1184 (CA9 2002) .. 2, 3, 10, 12

Rose v. Lundy, 455 U. S. 509, 71 L. Ed. 2d 379, 102 S. Ct. 1198 (1982) 6, 8, 16

Stone v. Powell, 428 U. S. 465, 49 L. Ed. 2d 1067, 96 S. Ct. 3037 (1976) 7, 18, 19

Teague v. Lane, 489 U. S. 288, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989) 8, 18, 25

United States v. Hayman, 342 U. S. 205, 96 L. Ed. 232, 72 S. Ct. 263 (1952) 15

Urquhart v. Brown, 205 U. S. 179, 51 L. Ed. 2d 760, 27 S. Ct. 459 (1907) 5

Wade v. Mayo, 334 U.S. 672, 92 L. Ed. 1647, 68 S. Ct. 1270 (1948) 15

Wainwright v. Sykes, 433 U. S. 72, 53 L. Ed. 2d 594, 97 S. Ct. 2497 (1977) 19, 20

Washington v. Schriver, 255 F. 3d 45 (CA2 2001) 10

Weeks v. Angelone, 528 U. S. 225, 145 L. Ed. 2d 727, 120 S. Ct. 727 (2000) 9

White v. Ragen, 324 U. S. 760, 89 L. Ed. 1348, 65 S. Ct. 978 (1945) 23

Williams v. Taylor, 529 U. S. 362, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000) 7, 9

Woodford v. Visciotti, 537 U. S. __, 154 L. Ed. 2d 279, 123 S. Ct. 357 (2002) 9

Woolsey v. Best, 299 U.S. 1, 81 L. Ed. 3, 57 S. Ct. 2 (1936) 17

Wright v. West, 505 U. S. 277, 120 L. Ed. 2d 225, 112 S. Ct. 2482 (1992) 6

Ylst v. Nunnemaker, 501 U. S. 797, 115 L. Ed. 2d 706, 111 S. Ct. 2590 (1991) 25

United States Statutes

28 U. S. C. § 2254(a)(3) 7

28 U. S. C. § 2254(b) 21, 22, 23, 27, 29

28 U. S. C. § 2254(c) 21, 23

28 U. S. C. § 2254(d) 9

28 U. S. C. § 2254(d)(1) 19

28 U. S. C. § 2254(e) 14

28 U. S. C. § 2255 19

Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81 4

Prison Litigation Reform Act of 1995, 42 U. S. C. § 1997e(a) 22

Rules of Court

Federal Rule of Criminal Procedure 12(b)(2) 19

Supreme Court Rule 10 25

Treatises

20A J. Moore, Moore's Federal Practice (3d ed. 2003) .. 12

9 B. Witkin, California Procedure (4th ed. 1997) 11

R. Fallon, D. Meltzer, & D. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System (4th ed. 1996) 26

Miscellaneous

141 Cong. Rec. 15,062, col. 2 (1995) 19

Act of Mar. 3, 1885, ch. 353, 23 Stat. 437 (1885) 5

Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441 (1963) 18

Forsythe, The Historical Origins of Broad Federal Habeas Review Reconsidered, 70 Notre Dame L. Rev. 1079 (1995) 5

Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142 (1970) 6, 7

H. R. Rep. No. 730, 48th Cong., 1st Sess., 5 (1884) 5

Hart, Foreword, The Time Chart of the Justices: The Supreme Court 1958 Term, 73 Harv. L. Rev. 84 (1959) 17, 22

Mayers, The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian, 33 U. Chi. L. Rev. 31 (1965) 4, 5, 18

Oaks, Legal History in the High Court—Habeas Corpus, 64 Mich. L. Rev. 451 (1966) 18

Reitz, Federal Habeas Corpus: Impact of an Abortive State Proceeding, 74 Harv. L. Rev. 1315 (1961) . . . 6, 17, 22, 23

Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888 (1998) 5, 9

IN THE

Supreme Court of the United States

GEORGE H. BALDWIN,

Petitioner,

vs.

MICHAEL REESE,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In the present case, the Ninth Circuit has directed that a Sixth Amendment claim be litigated on the merits in federal habeas corpus despite the fact that the habeas petitioner did not fairly present the claim at either level of the state's appellate

---

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

process, after counsel appointed for the petitioner at state expense determined that the claim had no merit. Such unnecessary relitigation of abandoned claims is contrary to the interests that CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

The facts and procedure of the present case, taken from the Ninth Circuit's opinion, may be summarized as follows:

Michael Reese was convicted in an Oregon state court of two counts of kidnapping and one count of attempted sodomy. *Reese* v. *Baldwin*, 282 F. 3d 1184, 1186 (CA9 2002). His convictions were affirmed on appeal, but his appellate counsel twice obtained reversals and remand for resentencing. *Id.*, at 1186-1187. However, on the third round, new appellate counsel found no meritorious issues to brief and followed an Oregon procedure, called a *Balfour* brief, which allows the defendant to brief *pro se* issues he wishes to raise. See *id.*, at 1187, and n. 1.

On state post-conviction review (PCR), Reese made a claim of ineffective assistance of appellate counsel, among other issues not relevant here. *Id.*, at 1188. His *pro se* petition did not cite federal authority for this claim, but the court appointed counsel who filed an amended petition which did cite the Sixth and Fourteenth Amendments. *Ibid.* On appeal from the trial court's denial of relief, a different attorney was appointed for Reese. He could find no meritorious issues and filed another *Balfour* brief. Reese's *pro se* PCR petition was attached as his part of the *Balfour* brief. *Ibid.* The Ninth Circuit says counsel "inexplicably" did this. *Ibid.* Since this portion of the *Balfour* brief is normally done by the appellant himself, if this choice was made without his knowledge or over his objection, it is surely up to him to say so. The most logical inference, in the absence of any evidence to the contrary, is that Reese himself chose to attach his *pro se* petition rather than the counsel-

prepared petition. For whatever reason, no federal authority in support of this claim was cited to the Oregon Court of Appeals.

On petition for discretionary review to the Oregon Supreme Court, a petition was prepared by counsel. It made passing reference to a claim of ineffective assistance of appellate counsel, but cited no facts, made no argument, and cited no authorities, state or federal, in support of the claim. *Id.*, at 1188-1189, and n. 5.

On federal habeas, the District Court found the ineffective assistance of appellate counsel claim to be procedurally defaulted. *Id.*, at 1189. The Court of Appeals for the Ninth Circuit reversed, believing the determinative question to be "whether Reese *alerted* the Oregon Supreme Court to the federal nature of his claim of ineffective assistance of appellate counsel." *Id.*, at 1192 (emphasis added).

SUMMARY OF ARGUMENT

The state appellate court is the primary forum for reviewing state trials, including any federal questions arising in those trials. The role of federal habeas corpus is "secondary and limited." The exhaustion and procedural default rules are essential components of Congress's policy to limit federal habeas corpus to its proper role. Not only does the procedural default rule protect the integrity of the exhaustion rule, as this Court has previously recognized, but these two rules also protect the integrity of the new "deference" rule of the Antiterrorism and Effective Death Penalty Act of 1996.

Since *Wainwright* v. *Sykes* in 1977, the procedural default rule has been considered a part of the doctrine of adequate and independent state grounds. However, the rule was originally understood to be part of the exhaustion requirement. The numerous problems with the adequate and independent state grounds doctrine make it appropriate, at this point, to reconsider that original understanding. The doctrine of adequate and

independent state grounds was developed for direct review and has not imported well into habeas corpus. Interpretation of the summary and unexplained state-court dispositions which are common in routine criminal cases has proven to be a continuing problem. The Ninth Circuit has applied the "strictly and regularly followed" requirement in such a severe manner as to create a perverse incentive for states to create rigid rules for cutting off state collateral review. A default rule based on the exhaustion requirement, if properly implemented, would simplify the task of federal habeas corpus and eliminate this perverse incentive.

ARGUMENT

I. The exhaustion and procedural default rules are essential components of Congress's policy to limit habeas to a secondary role.

A. History.

"Habeas corpus 'is designed to guard against *extreme malfunctions* in the state criminal justice systems.' " *Brecht* v. *Abrahamson*, 507 U. S. 619, 634 (1993) (emphasis added) (quoting *Jackson* v. *Virginia*, 443 U. S. 307, 332, n. 5 (1979) (Stevens, J., concurring in the judgment)). This role is "secondary and limited." *Barefoot* v. *Estelle*, 463 U. S. 880, 887 (1983). Keeping federal habeas confined to that role has been a continuing challenge for both Congress and this Court for well over a century.

In the original Judiciary Act, Congress gave the federal courts no jurisdiction to issue habeas corpus for state prisoners, except to bring them to court to testify. See Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81, 82. Only limited exceptions were made before the Civil War. See Mayers, The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian, 33 U. Chi. L. Rev. 31, 33 (1965). In 1867, Congress broadened federal habeas jurisdiction for the purpose of enforcing the

Thirteenth Amendment and related emancipation legislation. The expansion had nothing to do with using habeas corpus to review the final judgment of a competent court in a criminal case. See *id.*, at 36-37; Forsythe, The Historical Origins of Broad Federal Habeas Review Reconsidered, 70 Notre Dame L. Rev. 1079, 1108-1117 (1995). Such use was precluded under the case law up to that time, especially *Ex parte Watkins*, 3 Pet. (28 U. S.) 193, 209 (1830). See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 928-933 (1998). Nevertheless, the jurisdiction was used for that purpose during Reconstruction and the years immediately following. In 1884, the House Judiciary Committee reported,

> "But if the act of 1867 intended to allow interference in cases of arrests by State officers, under State authority, the committee do not believe that it was contemplated by its framers or can properly be construed to authorize the overthrow of the final judgments of the State courts of general jurisdiction, by the inferior Federal judges, whose judgments shall be final, *and thus make them a court of errors over the highest tribunals of the States*." H. R. Rep. No. 730, 48th Cong., 1st Sess., 5 (1884) (emphasis added); see also *Fay* v. *Noia*, 372 U. S. 391, 452-453 (1963) (Harlan, J., dissenting).

Congress's solution was to restore the appellate jurisdiction of this Court in habeas cases, which had been repealed during Reconstruction, with the confidence that this Court would rein in the lower federal courts. See Forsythe, 70 Notre Dame L. Rev., at 1121-1123; Act of Mar. 3, 1885, ch. 353, 23 Stat. 437 (1885). The Court responded by announcing the exhaustion rule in *Ex parte Royall*, 117 U. S. 241, 252-253 (1886). Although stated in terms of discretion, the rule effectively required state prisoners to pursue their remedies through the state appellate courts. The remedies to be exhausted at that time included a writ of error to this Court, see *Urquhart* v. *Brown*, 205 U. S. 179, 183 (1907), virtually shutting down

federal habeas for persons convicted in state courts. See Reitz, Federal Habeas Corpus: Impact of an Abortive State Proceeding, 74 Harv. L. Rev. 1315, 1327 (1961). After the change in this Court's jurisdiction from mandatory to discretionary review for most cases, the remedies to be exhausted no longer included a right to a definitive resolution of the merits by this Court. See *id.*, at 1328; *Darr* v. *Burford*, 339 U. S. 200, 235 (1950) (Frankfurter, J., dissenting).[2] Even so, as late as 1950, it was the rule that the federal habeas court "may decline to examine further into the merits because they have already been decided against the petitioner" and "that the state's highest courts should ordinarily be subject to reversal only by this Court . . . ." See *Darr*, *supra*, at 215, 217.

Prior to the period of *de novo* review, exhaustion was much more than a rule of timing. Its purpose was to require the defendant to go to the state courts for a ruling on the merits which would, in most cases, be the last full examination of the case. "[A] federal court will *not ordinarily re-examine* upon writ of habeas corpus the questions thus adjudicated." *Ex parte Hawk*, 321 U. S. 114, 118 (1944) (*per curiam*) (emphasis added). Relitigation in federal court was limited to cases where "the remedy afforded by state law proves in practice unavailable or seriously inadequate . . . ." *Ibid.*; see also *Fay* v. *Noia*, 372 U. S., at 459-460 (Harlan, J. , dissenting). This is the rule Congress understood it was endorsing when it codified the exhaustion rule in 1948. See *Darr*, 339 U. S., at 211; *Rose* v. *Lundy*, 455 U. S. 509, 516 (1982).

Brown v. *Allen*, 344 U. S. 443 (1953) is the case generally credited with (or blamed for) abandoning the rule of deference and establishing *de novo* review as the norm. See, *e.g.*, *Noia*, 372 U. S., at 460 (Harlan, J., dissenting); Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 154-155 (1970); but see *Wright* v. *West*, 505 U. S. 277, 287-288 (1992) (opinion of Thomas, J.) (disputing that *Brown* actually held that); Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Wright* v. *West*, No. 91-542, pp. 14-16 (same). Judge Friendly attributes the abandonment of this rule and the establishment of *de novo* review on federal habeas to "the growth of the country and the attendant increase in the Court's business," so that the Court "had to summon the inferior federal judges to its aid" to correct errors in state courts. Friendly, *supra*, at 155. While growth of the country may be part of the explanation, there can be no doubt that state court resistance to civil rights and to the greatly expanded rights for criminal defendants in the 1950s and 1960s was also a major factor. By the mid-1970s, this hostility to federal rights had abated, see *Stone* v. *Powell*, 428 U. S. 465, 493, n. 35 (1976), and a period of retrenchment began, culminating in the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

2. *Darr* has been overruled on other grounds. See *infra*, n. 10.

AEDPA made many changes to habeas corpus law, but the most important was the abrogation of the rule of *de novo* review. See *Williams* v. *Taylor*, 529 U. S. 362, 404 (2000). Simultaneously, Congress strengthened the exhaustion rule, specifying that the state could expressly waive the rule, but not inadvertently default it. See 28 U. S. C. § 2254(a)(3). Congress must have considered exhaustion to be a vitally important policy to make it one of the few defenses in the law which cannot be lost by failure to assert it. The reason lies in how three rules—exhaustion, default, and deference—fit together to restrain federal habeas from substituting for state appeal.

B. Three Interlocking Pieces.

In *O'Sullivan* v. *Boerckel*, 526 U. S. 838 (1999), both the majority opinion and Justice Stevens' dissent addressed the "interplay" of the exhaustion and procedural default rules. See *id.*, at 848. The majority agreed with the dissent that

> "a prisoner could evade the exhaustion requirement—and thereby undercut the values that serves—by 'letting the time run' on state remedies. *Post*, at 853. To avoid this result,

and thus 'protect the integrity' of the federal exhaustion rule, *ibid.*, we ask not only whether a prisoner has exhausted his state remedies, but also whether he has *properly* exhausted those remedies, *i.e.*, whether he has fairly presented his claims to the state courts, see *post*, at 854." *Ibid.* (emphasis in original).

The *O'Sullivan* dissent's assertion that the two rules are "analytically distinct," *id.*, at 850, is an overstatement. The fact that one of the principal purposes of the procedural default rule is to protect the integrity of the exhaustion rule necessarily ties the two together. The procedural default rule cannot serve this function unless the requirement of fair presentation is identical for both rules. If we assume the validity of present doctrine that the exhaustion requirement is satisfied by letting the time run, so that no state remedy remains available,[3] then it is essential that any claim "exhausted" in this improper manner be subject to the procedural default rule. Otherwise, there would be a loophole allowing defendants in state criminal proceedings to bypass state courts and raise their claims for the first time in federal court, without qualifying for any of the exceptions to the procedural default rule.

Stated another way, *every* claim asserted on federal habeas falls into one and only one of three categories: (1) it was fairly presented to the state courts; (2) it is unexhausted; or (3) it is procedurally defaulted. If the claim was fairly presented, the federal court can proceed to the questions of AEDPA and *Teague* v. *Lane*, 489 U. S. 288 (1989). See *Horn* v. *Banks*, 536 U. S. 266, 272 (2002) (*per curiam*). If any claim is unexhausted, the petition must be dismissed. *Rose* v. *Lundy*, 455 U. S. 509, 522 (1982). If the claim is procedurally defaulted, it must be denied unless the petitioner can show cause and prejudice or a fundamental miscarriage of justice. See *Coleman* v. *Thompson*, 501 U. S. 722, 746, 757 (1991).

---

3. We challenge this assumption in Part II, *infra*.

With the enactment of AEDPA, the exhaustion and procedural default rules not only reinforce each other, but they now serve the additional purpose of protecting the integrity of the "deference" standard of 28 U. S. C. § 2254(d). After AEDPA, it is once again the exception rather than the norm for a question decided in state court to be decided again in federal court, as it was before *Brown* v. *Allen*. See Scheidegger, 98 Colum. L. Rev., at 946; *supra*, at 6. If the state court decided the merits, then the federal court need only satisfy itself that the state court's decision is neither contrary to nor an unreasonable application of Supreme Court precedent. At that point the habeas case is over, and the federal court need not decide the underlying question. See, *e.g.*, *Lockyer* v. *Andrade*, 538 U. S. __, 155 L. Ed. 2d 144, 155, 123 S. Ct. 1166, 1172 (2003); *Woodford* v. *Visciotti*, 537 U. S. __, 154 L. Ed. 2d 279, 288, 123 S. Ct. 357, 361 (2002) (*per curiam*).[4] Only by such shortening of the decision process would this section achieve Congress's goal in enacting it, to reduce delay. See *Williams* v. *Taylor*, 529 U. S., at 404.

State criminal defendants sometimes perceive, often accurately, that the federal courts of their circuit are more likely to look favorably on a marginal claim than the courts of their state. For example, *Woodford* v. *Visciotti*, *supra*, is quite typical of California capital cases, where the California Supreme Court decides an ineffective assistance claim well within the boundaries of this Court's precedents only to have it erroneously vacated on federal habeas corpus, in violation of the standard of AEDPA. This Court summarily reversed in *Visciotti*, and hopefully the clarification of the standard will result in habeas being properly denied in similar cases in the future.

---

4. The habeas court *may* decide the merits first, as a correct decision is necessarily a reasonable decision, see *Weeks* v. *Angelone*, 528 U. S. 225, 237 (2000), but this will typically not be the most efficient method.

Defendants seeking to avoid this result may see it in their interest to *avoid* obtaining a state court resolution of the merits of their federal claim. The fair presentation requirement, properly applied, will prevent such evasion of the intent of Congress. *Castille* v. *Peoples*, 489 U. S. 346, 351 (1989) held that the fair presentation requirement was not fulfilled when the petitioner presented his claim to the state court in a manner that would not normally result in a decision on the merits.

The Ninth Circuit held in the present case that the exhaustion requirement is satisfied if the Oregon Court of Appeals merely had *notice* that a federal claim existed in the case, regardless of whether the petitioner actually presented that claim to that court. *Reese* v. *Baldwin*, 282 F. 3d 1184, 1193 (CA9 2002). This Court unequivocally rejected the notice theory of exhaustion in *Keeney* v. *Tamayo-Reyes*, 504 U. S. 1, 10 (1992): "Exhaustion means more than notice. In requiring exhaustion of a federal claim in state court, Congress surely meant that exhaustion be serious and meaningful." With the enactment of AEDPA, meaningful exhaustion is more important now than it was when *Keeney* was decided.

C. Serious and Meaningful Appeals.

When Congress enacted § 2254(d), regarding claims "adjudicated on the merits in State court proceedings," it no doubt had principally in mind claims denied in written opinions by appellate courts. *Amicus* CJLF does not denigrate the written rulings of trial courts, but it is common knowledge that appellate courts more often have the resources needed to produce a quality opinion on a substantial question. The more thorough the state opinion, the more straightforward will be the task of the federal habeas courts. Summary denials and denials with minimal explanation can present problems in the application of § 2254(d). See *Washington* v. *Schriver*, 255 F. 3d 45, 52-53 (CA2 2001) (noting difficulty and division among circuits); cf. *Coleman*, 501 U. S., at 740 (summary denial and procedural default).

While summary affirmances are, to some extent, a necessary evil for overburdened appellate courts, a reasoned opinion is a far more likely result if the appellant has presented a substantial claim of a violation of a constitutional right. Conversely, summary rejection is far more likely when an appellant presents a claim devoid of content. The general rule throughout the United States is that an appellate court is justified in treating a claim as waived if it is presented without facts, argument, or authorities.

The California rule is typical:

> "The reviewing court is not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment. It is entitled to the assistance of counsel. Accordingly, every brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the courts may treat it as waived, and pass it without consideration." 9 B. Witkin, California Procedure § 594, p. 627 (4th ed. 1997); *People* v. *Stanley*, 10 Cal. 4th 764, 793, 897 P. 2d 481, 497 (1995) (quoting previous edition of Witkin for this point).

Oregon follows a similar rule. "Defendant offers no argument on this assignment [of error] and cites no cases. The assignment not having been discussed in the brief, it 'is presumed waived,' [citation], or it is 'abandoned.' [Citation.]" *Meskimen* v. *Larry Angell Salvage Co.*, 592 P. 2d 1014, 1019 (Or. 1979); *Peterson* v. *Maass*, 882 P. 2d 1140, 1141, n.2 (Or. App. 1994) (applying *Meskimen* to constitutional claims in PCR case).[5] So do other courts around the country, applying it alike to civil and criminal cases and constitutional as well as nonconstitutional issues. See, *e.g.*, *Commonwealth* v. *Johnson*, 602 N. E. 2d 555, 558, n. 6 (Mass. 1992) (search and seizure

---

5. We understand that Oregon law on this point will be described in more detail in the Oregon Attorney General's brief, so we will not repeat it here.

claim without argument waived); *New England Tel. & Tel. Co.* v. *City of Franklin*, 685 A. 2d 913, 918 (N. H. 1996) ("passing reference" insufficient, argument waived). A party who claims a violation of both the state and federal constitutions must cite authority for both, or the unsupported claim is waived. See *In re Bay Area Citizens Against Lawsuit Abuse*, 982 S. W. 2d 371, 375, n. 4 (Tex. 1998) (claim under both First Amendment and parallel Texas provision, state claim waived by lack of authority).

Federal practice is also in accord. "Issues presented in the brief will be dismissed or deemed waived if the appellant's contentions are omitted, if no relevant authority is cited, or if the brief merely incorporates by reference arguments presented to the District Court." 20A J. Moore, Moore's Federal Practice § 328.20[9], p. 328-14 (3d ed. 2003) (footnotes omitted). "[A]n argument or claim mentioned only in passing or only in a footnote is not adequately raised or preserved for appellate review." *Id.*, at 328-15 to 328-16. Indeed, if a habeas petitioner files a brief in the Ninth Circuit like the one Reese filed in the Oregon Supreme Court, the Ninth Circuit itself will consider the point waived. See *Acosta-Huerta* v. *Estelle*, 7 F. 3d 139, 144 (CA9 1992); see also *Reese* v. *Baldwin*, 282 F. 3d, at 1195 (Nelson, J., dissenting).

Looking at Reese's petition for review and the Oregon cases on waiver by failure to brief, it is evident that the Oregon Supreme Court *could* have denied relief on this basis and that this would be an adequate and independent state ground sufficient to deny federal habeas relief. However, that basis for decision would raise all of the familiar problems of determining the actual basis for a summary order. See generally *Coleman*, *supra*. That problem is particularly acute when the procedural default consists of a dismal failure to make *any* case on the merits, since the state judges themselves may not clearly distinguish whether they are denying relief for lack of merit or failure to argue any merit. A better basis for decision is that a contention on appeal so lacking in argument or authority that a

court would be justified in deeming it waived under the standards prevailing generally in American appellate courts is insufficient, as a matter of federal habeas law, to constitute a fair presentation of the claim. Because the claim was not fairly presented, it is unexhausted if the petitioner can still return to the state courts to fairly present the claim, and otherwise it is procedurally defaulted.

II. The procedural default rule should be returned to its original status as a component of the exhaustion requirement.

A. The Rise, Fall, and Rise of the Procedural Default Rule.

In modern cases, it has become common to assert matter-of-factly that the exhaustion requirement is satisfied, even though the claim has not been fairly presented to the state courts, if the time to assert the claim there has expired. See, *e.g.*, *O'Sullivan* v. *Boerckel*, 526 U. S. 838, 850 (1999) (Stevens, J., dissenting). That was not the rule prior to 1963, and the issue is ripe for reconsideration.

Ex parte Spencer, 228 U. S. 652 (1913) appears to be the first Supreme Court case that expressly addresses a claim for which state remedies were no longer available at the time of the filing of the federal habeas petition.[6] Spencer appealed his conviction to the intermediate appellate court and sought review in the Pennsylvania Supreme Court without raising his *ex post facto* claim. *Id.*, at 658. He then raised his *ex post facto* claim in state habeas, which was denied, and then federal habeas. *Ibid.* The Court denied relief, citing the exhaustion

---

6. *In re Wood*, 140 U. S. 278, 289-290 (1891) is a possibility, invoking the exhaustion rule for a claim never presented to the state courts when the time to do so appears to have passed, without inquiring whether any state remedy remained available. However, the opinion is not explicit on the point.

rule. See *id.*, at 659-660 (citing *Urquhart* v. *Brown*, 205 U. S. 179 (1907)).

> "It is true the rule has been announced in cases where *habeas corpus* was applied for in advance of final decision in the state courts; but the principle of the rule applies as well after decision. The rule would be useless except to enforce a temporary delay if it did not compel a review of the question in the state court and, in the event of an adverse decision, the prosecution of error from this court. In other words, if it gave freedom to omit such defenses in the state court and subsequent review by this court, and yet the accused have an absolute right to *habeas corpus*." *Id.*, at 660.

Claims that the judge-made *Royall* rule, see *supra*, at 5, was strictly a timing rule and referred only to remedies existing at the time of the federal habeas petition, see, *e.g.*, *O'Sullivan*, 526 U. S., at 850, 852-853 (Stevens, J., dissenting), cannot be reconciled with *Spencer*. As far back as 1913, a failure to exhaust state remedies permanently barred federal habeas corpus if the unexhausted remedy had lapsed in the interim.

The two best-known early twentieth century cases are more equivocal. *Frank* v. *Mangum*, 237 U. S. 309, 338-340 (1915) denied habeas relief on a claim defaulted at trial (presence of the defendant when the verdict was rendered) and rejected for that reason on appeal.[7] The basis is that the state's default rule was a reasonable one, comporting with due process, consistent with the later theory of an adequate state ground. In a similar procedural posture, *Moore* v. *Dempsey*, 261 U. S. 86 (1923) vacated a dismissal and remanded for a hearing on the merits. The basis of this action is less than clear, but it appears to be that the magnitude of the violation alleged, "that the whole proceeding is a mask—that counsel, jury, and judge were swept

---

7. Frank's much stronger claim of a mob-dominated trial was rejected on the basis of deference to contrary state court factual findings, *id.*, at 338, which remains the law to this day. See 28 U. S. C. § 2254(e).

to the fatal end by an irresistible wave of public passion," *id.*, at 91, called for overriding procedural requirements, reminiscent of the modern "miscarriage of justice" exception. Cf. *Murray* v. *Carrier*, 477 U. S. 478, 495-496 (1986). Looking at the facts of *Moore* through a modern lens, it is evident that Moore had a good claim of "cause" for default due to ineffective assistance of counsel. Cf. *id.*, at 492.

Wade v. *Mayo*, 334 U. S. 672 (1948) was decided two days before the codification of the exhaustion rule. See *Darr* v. *Burford*, 339 U. S. 200, 213, n. 34 (1950). Wade made his denial of counsel claim on state habeas and appealed the denial to the Florida Supreme Court, which dismissed without opinion. Wade did not petition this Court for certiorari. 334 U. S., at 675-676. A year later, he petitioned for federal habeas. Habeas cases are civil for the purpose of appellate time limits, see *United States* v. *Hayman*, 342 U. S. 205, 209, n. 4 (1952), so the time to petition for certiorari from the state decision was long gone. The Florida Supreme Court subsequently verified that its dismissal had been on the merits, not on failure to appeal. *Wade*, *supra*, at 678.

The *Wade* Court asked for argument on whether the exhaustion rule required dismissal, *id.*, at 677, and divided narrowly on the answer. The four dissenting Justices asserted (1) that certiorari is among the remedies to be exhausted, *id.*, at 689 (Reed, J., dissenting), and (2) that the exhaustion requirement applies equally to presently available remedies and those that are time-barred. *Id.*, at 695. Conspicuous by its absence from the majority opinion is *any* disagreement with the second proposition. The reversal is premised entirely on distinguishing writs of certiorari from this Court from the remedies in state courts, see *id.*, at 680-681, a distinction that would have been unnecessary if the exhaustion rule did not apply to defaulted claims.

Wade was overruled in *Darr*, *supra*, the first Supreme Court default case after codification of the exhaustion rule in 1948. Darr had not appealed from his conviction, but the state courts

had considered his claim on the merits in state habeas. See 339 U. S., at 202. He did not petition for certiorari from this decision, and the time to do so had long since expired by the time the case reached the Supreme Court. Most of the majority and dissenting opinions are devoted to a discussion of whether a certiorari petition to this Court is one of the remedies to be exhausted under § 2254. Neither opinion questions that denial for lack of exhaustion is the proper consequence of an affirmative answer to that question. See *id.*, at 201; *id.*, at 220 (Frankfurter, J., dissenting).

Failure to exhaust was the basis of the default holding in *Daniels* v. *Allen*, a companion case to *Brown* v. *Allen*, 344 U. S. 443 (1953). "A failure to use a state's available remedy, in the absence of some interference or incapacity, such as is referred to just above at notes 32 and 33, *bars* federal habeas corpus. The statute requires that the applicant exhaust available state remedies. *To show that the time has passed for appeal is not enough* to empower the Federal District Court to issue the writ." *Id.*, at 487 (emphasis added). Footnote 32 cites *Dowd* v. *Cook*, 340 U. S. 206 (1951), a case of interference with filing by prison officials, and two denial of counsel cases, *De Meerleer* v. *Michigan*, 329 U. S. 663 (1947) and *Johnson* v. *Zerbst*, 304 U. S. 458 (1938).[8] Justice Black dissented on the ground that this was a case of "flagrant defiance of the Constitution," in which, under *Moore* v. *Dempsey*, "it is never too late for courts in habeas corpus proceedings to look straight through procedural screens . . . ." *Brown*, 344 U. S., at 554; cf. *Rose* v. *Lundy*, 455 U. S., at 543 (Stevens, J., dissenting) (proposing unlimited habeas review for "fundamental" claims, regardless of default, and no relitigation of nonfundamental claims). Justice Frankfurter dissented based on both the magnitude of the violation and the arbitrariness of the state rule as applied to this case. 344 U. S., at 557-558; cf. *Lee* v. *Kemna*, 534 U. S.

8. The reference to footnote 33 is unclear, as this note deals with another point.

362, 378 (2002) ("in this atypical instance, [applying] the Rule would serve 'no perceivable state interest' ") (quoting *Osborne* v. *Ohio*, 495 U. S. 103, 123 (1990)). Neither dissent questions that a routine claim would be defaulted by failure to properly exhaust state remedies.

The next case in the series is *Irvin* v. *Dowd*, 359 U. S. 394 (1959). Irvin had a strong claim of denial of due process due to inflammatory publicity, see *id.*, at 396-399, which he defaulted by escaping. *Id.*, at 400. The main issue was the interpretation of the state supreme court opinion, which the majority read as excusing the procedural default and resting on the federal merits. See *id.*, at 403. The opinion unequivocally reaffirmed that exhaustion was the basis of the procedural default rule, and distinguished *Daniels* on its facts without disagreeing with its rule of law. *Id.*, at 404-406. Justice Harlan saw the question as "whether the state court's judgment affirming the conviction rests independently on . . . a state ground." *Id.*, at 413 (dissenting opinion). This was the first time that doctrine had been expressly invoked in a habeas procedural default case in this Court.[9] The *Irvin* opinion was greeted by two scathing law review articles. See Hart, Foreword, The Time Chart of the Justices: The Supreme Court 1958 Term, 73 Harv. L. Rev. 84 (1959); Reitz, Federal Habeas Corpus: Impact of an Abortive State Proceeding, 74 Harv. L. Rev. 1315 (1961). Nonetheless, *Irvin* marked the fourth case in a row in which the exhaustion rule was considered the basis of procedural default.

Justice Brennan, the author of *Irvin*, was also the author of *Fay* v. *Noia*, 372 U. S. 391 (1963). "This decision, both in its abrupt break with the past and in its consequences for the future, is one of the most disquieting that the Court has

9. More precisely, it was the first time in a federal habeas case. The doctrine had previously been invoked to deny review by this Court of state habeas decisions, when the state court declined to review claims that could have been made on appeal, but were not. See *Woolsey* v. *Best*, 299 U. S. 1, 2 (1936) (*per curiam*).

rendered in a long time." *Id.*, at 448 (Harlan, J., dissenting). *Noia* reviewed the two arguable bases of the Court's past procedural default decisions, independent state grounds and exhaustion, and rejected them both, *id.*, at 428-435, all the while denying that anything it said was inconsistent with precedent.[10] In place of the long line of precedent overruled *sub silento* was a newly-minted standard of deliberate bypass. *Id.*, at 438.

Noia was utterly indefensible as a matter of history or precedent. See *id.*, 449-463 (Harlan, J., dissenting); Mayers, The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian, 33 U. Chi. L. Rev. 31, 58 (1965); Oaks, Legal History in the High Court—Habeas Corpus, 64 Mich. L. Rev. 451, 458-468 (1966). The defensible ground for the decision lay not in the history of the Great Writ but in the exigencies of the times. This was the era of "massive resistance," and state courts hostile to civil rights were shamelessly manipulating procedural rules to block federal review. See, *e.g.*, *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 457 (1958). Professor Bator recognized this on the eve of the *Noia* decision. See Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 523-524 (1963). It is most unfortunate that the *Noia* opinion did not forthrightly assert the real reason, rather than take the path it did. See Oaks, *supra*, at 472.

When the emergency that prompts measures of dubious legality has passed, the law should return to normal. See *Ex parte Milligan*, 4 Wall. (71 U. S.) 2, 109 (1866). So it happened, eventually, with habeas corpus. The *de novo* review rule of *Brown* v. *Allen*, *supra*, was mitigated by this Court in *Stone* v. *Powell*, 428 U. S. 465, 481-482 (1976) and *Teague* v. *Lane*,

10. On the other hand, *Noia* was frank in overruling the holding of *Darr*, that a petition for certiorari to this Court was required for exhaustion, on the sensible and legitimate ground that the growth in the Court's workload had rendered it impractical. *Id.*, at 437.

489 U. S. 288, 310 (1989) (plurality opinion), and it was finally abrogated by statute in AEPDA, enacting 28 U. S. C. § 2254(d)(1). All three rules were based in large part on renewed confidence in state courts. See *Stone*, *supra*, at 493, n. 35; *Caspari* v. *Bohlen*, 510 U. S. 383, 395 (1994); 141 Cong. Rec. 15,062, col. 2 (1995) (statement of Sen. Hatch).

The procedural default rule had a similar stepwise revival. In *Davis* v. *United States*, 411 U. S. 233, 234-236 (1973), a federal defendant sought to use *Noia* to get around the requirement of Federal Rule of Criminal Procedure 12(b)(2), that an objection to the composition of the grand jury must be raised before trial, unless cause for raising it later was shown. The Court found it "inconceivable" that Congress could have intended 28 U. S. C. § 2255 to allow such an easy circumvention of a rule that Congress had "adopted." *Davis*, *supra*, at 241-242. The dissent protested that this was contrary to *Noia*, see *id.*, at 245 (Marshall, J., dissenting), and so it was. *Francis* v. *Henderson*, 425 U. S. 536, 539-541 (1976) relied heavily on *Davis* in a state prisoner case. The brief opinion did not state any explicit theoretical ground for making the jump from federal to state prisoners. Congress had not enacted the state procedural rule. However, *Francis* did rely on a direct review, independent state grounds case. *Id.*, at 541 (quoting *Michel* v. *Louisiana*, 350 U. S. 91 (1955)). It would have been difficult to invoke the pre-*Noia* exhaustion basis of procedural default in a case relying heavily on *Davis*, because Davis was a federal prisoner, for whom the exhaustion doctrine was inapplicable.

Wainwright v. *Sykes*, 433 U. S. 72 (1977) made it official. A weak *Miranda* claim, see *id.*, at 96-97 (Stevens, J., concurring), was denied on default grounds, with independent state grounds endorsed as the basis of the default rule. See *id.*, at 81. Exhaustion as the basis of the default rule is not mentioned. *Sykes* claims *Brown/Daniels* was based on "an independent and adequate state procedural ground." See *id.*, at 82 (citing *Brown*, 344 U. S., at 486-487). This is a curious citation. The paragraph of *Brown* that spans those two pages is unequivocally an

exhaustion rationale, and the discussion that precedes that paragraph relies on *Darr*, *Spencer*, and *Wood*, all of which are unambiguous exhaustion cases. See 344 U. S., at 486, n. 35. Heavy reliance on *Davis* and *Francis*, see *Sykes*, *supra*, at 84-85, was probably thought necessary in *Sykes* to meet the *stare decisis* implications of the dissent's reliance on *Noia*. See *id.*, at 99 (Brennan, J., dissenting); see also *id.*, at 81 (noting how much turmoil there has been in habeas law). Arguably, basing the decision on *Davis* and *Francis* meant having to rely on independent state grounds rather than exhaustion. For whatever reason, that has been considered the basis of the default rule ever since, without critical reexamination.[11]

The endorsement of independent state grounds as the basis of the procedural default rule seems to be something of a historical accident. It apparently arose from the need to ease out an expediency-based decision that had outlived its usefulness, rather than from a considered evaluation of its relative utility and appropriateness, compared to the earlier view that default was an aspect of the exhaustion rule. The importation into habeas corpus of a rule designed for this Court's direct review has created a host of problems. In the Ninth Circuit, particularly, these problems threaten the very existence of the procedural default rule and thereby threaten the integrity of the exhaustion rule.

B. The Statutory Language.

"*Plainly*," declares *Fay* v. *Noia*, "the words of § 2254 favor a construction limited to presently available remedies." 372 U. S., at 434, n. 42 (emphasis added). Why the Supreme Court of the United States on three separate occasions, see *supra*, at 15-17, applied this statute to a situation where it *plainly* does not apply is not explained. The *Noia* opinion also says, "Very little support can be found in the long course of previous

11. *Coleman* v. *Thompson*, 501 U. S. 722, 750 (1991) finally overruled *Noia*.

decisions by this Court" that Congress understood it was codifying in 1948. *Id.*, at 434-435. As discussed *supra*, at 13-14, *Ex parte Spencer* is a precedent of this Court *squarely holding* that the exhaustion rule applies to this situation, and that precedent was not overruled or questioned in any decision prior to the codification. The history of the statute therefore provides very *strong* support that defaulted claims are included in the exhaustion rule, and the language is worth another look.

The 1948 codification survives today as subdivisions (b)(1) and (c) of 28 U. S. C. § 2254, with only stylistic changes:[12]

> "(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)(i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> (2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.
>
> (3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

12. The original language is quoted in *Brown*, 344 U. S., at 462, n. 17.

Subdivisions (b)(2) and (3) are new in AEDPA. Their only relevance to the present question is the strong reaffirmation by Congress in (b)(3) of the importance of the exhaustion rule. See *supra*, at 7. The two pre-*Noia* law review articles simply state the supposedly clear inapplicability of the statutory language to time-barred remedies as an *ipse dixit*, and neither mentions *Spencer*. Reitz, 74 Harv. L. Rev., at 1365 (citing Hart); Hart, 73 Harv. L. Rev., at 113; see also *Noia*, 372 U. S., at 434, n. 42 (citing Reitz).

The starting place for analyzing a statutory exhaustion requirement is what such requirements mean in the law generally. Outside of habeas corpus, this term arises most often in administrative law. Congress sometimes requires that aggrieved persons "exhaust" their administrative remedies before turning to the courts. The common understanding of such statutes is that they refer to remedies existing at any time prior to filing the court suit, not just those remaining at the time of filing. *Porter* v. *Nussle*, 534 U. S. 516 (2002) is a recent example. Congress imposed an exhaustion requirement on prisoners in the Prison Litigation Reform Act of 1995, 42 U. S. C. § 1997e(a). See *Nussle*, *supra*, at 519-520. Nussle had 30 days to file his administrative grievance, and that time was long gone when he filed his civil rights court suit almost three years after the incident. *Id.*, at 521. The District Court correctly dismissed for failure to exhaust administrative remedies. See *id.*, at 521, 532. Conspicuous by its absence from this Court's opinion is any suggestion that Nussle had satisfied the exhaustion requirement simply by letting his time run. The general rule is well understood in administrative exhaustion that failure to invoke the administrative remedy within the time required forfeits both the administrative and the judicial remedies. For example, *Bowen* v. *City of New York*, 476 U. S. 467, 482 (1986), found that an administrative exhaustion requirement was excused under the circumstances, rather than satisfied, when claimants failed to employ an administrative review process within its time deadlines.

The question is whether there is anything in the language of § 2254 to indicate that Congress intended something different from the usual meaning of an exhaustion requirement. The present perfect tense "has exhausted" implies an action that has been completed as of the time of the federal habeas suit. The simple present tense in (b)(1)(A), "is an absence of available State corrective process," does not imply existence at any particular point in time. It is just as consistent with an interpretation referring to continuing existence in the state's remedial structure. The only language that leans in the direction of referring only to presently available remedies is subdivision (c). This subdivision does not purport to be an exclusive definition of exhaustion limiting the general rule of subdivision (b), but rather specifies one situation where "[a]n applicant shall *not* be deemed to have exhausted . . . ." (Emphasis added.)

History, in the form of the pre-1948 cases, illuminates the meaning of these phrases. As discussed *supra*, at 13-14, *Ex parte Spencer* supports exhaustion as referring to remedies available at any time in the process. *Amicus* has found no Supreme Court authority to the contrary. Professor Reitz admits, "cases interpreting the exhaustion requirement as applicable only to present state remedies are hard to find," and he could cite only two circuit cases, only one of which predated the codification. 74 Harv. L. Rev., at 1364, n. 165. The statute's reference to absence of state corrective process appears to be intended to deal with the situation of *White* v. *Ragen*, 324 U. S. 760, 764-767 (1945), where the state simply has no procedure for adjudicating constitutional claims based on facts outside the record. The statute also allows for the situation where state remedies are ineffective in practice in (b)(1)(B)(ii), a reference to cases of default caused by interference by the state or denial of counsel, see *Brown*, 344 U. S., at 486, n. 32, 487, or the situation in *Moore* v. *Dempsey*, 261 U. S. 86, 91 (1923) where counsel intimidated by the mob defaulted the claim.

The language of the statute, on its face, is fully consistent with the view that the exhaustion requirement includes defaulted remedies as well as currently existing ones. When viewed in light of its history, this interpretation can be seen to be the correct one.

C. The Trouble with State Grounds.

Amicus CJLF would not ask this Court to overturn an interpretation in force for 26 years, however unsupported as initial matter, if that interpretation were working well. We would be content to let a sleeping dog lie if the dog were sleeping soundly. Regrettably, that is not the case. The complexities of the adequate and independent state grounds doctrine have caused the law of procedural default in habeas corpus to be radically different in different parts of the country, apparently beyond the capacity of this Court to correct. The doctrine creates perverse incentives for states to eliminate exceptions to their default rules, remove discretion from courts, and enact harsh statutes of limitations. If the wounds inflicted by this confused doctrine will not stop bleeding, then states must apply a tourniquet.

1. Improper focus.

The doctrine of adequate and independent state grounds was developed for questions of substantive law in state court cases subject to this Court's direct review. Where a state court's decision of a state law issue resolves the controversy regardless of which way the federal question is decided, there is no appropriate subject for this Court's review. See *Murdock* v. *City of Memphis*, 20 Wall. (87 U. S.) 590, 634-635 (1875). In this situation, the focus is necessarily and properly on the state court's decision, rather than on anything the parties have done.

Importing this test into habeas corpus and applying it to procedural rules creates considerable problems with interpreting state decisions. The state court decisions reviewed by this Court on certiorari typically involve questions of law on which

courts disagree, and they have usually been decided in full, reasoned opinions, most often by the highest court of the state, with the issue in question being the main issue of the case. Cases where a party merely asks for the application of established law to the facts of his case are rarely "certworthy." See Supreme Court Rule 10. Federal habeas corpus today is almost entirely about application of existing law to particular facts, since adventures in new lawmaking on habeas were largely shut down by *Teague* v. *Lane*, 489 U. S. 288 (1989) and AEDPA. The cases are often disposed of in the state courts with brief, unpublished opinions, particularly in noncapital cases. The claim at issue may have been one of a hundred, given the shotgun allegations of error so common in criminal appellate practice today. When these factors are combined, it is easy to see why difficulty in discerning the basis of the state decision is common. In the present case, we do not know and cannot know to what extent the Oregon Court of Appeals' affirmance was due to Reese's failure to properly raise and brief claims and to what extent it was due to the court's agreement with the lower court decision. The "look through" presumption of *Ylst* v. *Nunnemaker*, 501 U. S. 797 (1991) is unjustified when an issue is not briefed on appeal. Cf. *Coleman* v. *Thompson*, 501 U. S. 722, 737 (1991) (bright-line rules unjustified when counterfactual).

In one situation, the idea that a state judgment rests on an independent state ground with regard to a defaulted claim is pure fiction. That is the case when a petitioner goes to federal habeas corpus with a claim he has never presented to the state courts at all, but which is now barred under state law. In that case, the federal court must decide the state procedural question itself, and there simply is no relevant state decision to examine. See *Harris* v. *Reed*, 489 U. S. 255, 269-270 (1989) (O'Connor, J., concurring).

Basing the procedural default on exhaustion rather than independent state grounds would shift the focus from the state court decision to the steps taken by the petitioner to obtain a

state decision on the merits, and it would simultaneously simplify the inquiry. Assuming the state has a readily discernible forum and procedure for obtaining review of an issue, did the petitioner invoke the correct procedure in the correct forum within the allowed time? If he did not, then he has not exhausted available state remedies within the meaning of § 2254(b)(1)(A). The only qualification would be that if the state court clearly excused default and resolved a nonstandard or out-of-time petition on the merits, rather than on the default rule, federal habeas is not barred. See *Brown*, 344 U. S., at 486, and n. 33. Otherwise, the petitioner will have to try to qualify for one of the exceptions in subdivision (b)(1)(B), discussed *infra*, at 27-28.

2. Perverse incentives.

The doctrine that a state procedural rule, to be "adequate," must be "strictly and regularly followed" came from *Barr* v. *City of Columbia*, 378 U. S. 146, 149 (1964). *Barr* was one of a series of cases during the civil rights struggle, when some state courts cynically manipulated procedural rules in an attempt to preclude this Court's review. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Lee* v. *Kemna*, No. 00-6933, p. 11 ("*Lee* Brief").[13] Unfortunately, the "varying rubrics" used by this Court for "adequate" state grounds have never been unified into a coherent standard. See R. Fallon, D. Meltzer, & D. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 582 (4th ed. 1996). Confusion in this area is rampant. See *Lee* Brief, at 5-11. Such confusion breeds radically different application of the law in different circuits.

In the Fifth Circuit, an "occasional act of grace" does not disqualify a state rule from being "adequate." *Amos* v. *Scott*, 61 F. 3d 333, 342 (CA5 1995). Similarly, the Seventh Circuit wisely recognizes that a strict interpretation of "strictly" would discourage flexibility and discretion in the operation of state

13. This brief is available on our Web site, http://www.cjlf.org/pdf/Lee.pdf

review systems, with "unacceptably harsh consequences." *Prihoda* v. *McCaughtry*, 910 F. 2d 1379, 1383-1384 (CA7 1990). Regrettably, this wisdom has not prevailed in the Ninth Circuit, where a state default rule will be branded "inadequate" merely because it is "flexible" and "involves discretion." See *Fields* v. *Calderon*, 125 F. 3d 757, 762, 764-765 (CA9 1997), cert. denied, 523 U. S. 1132 (1998); *Petrocelli* v. *Angelone*, 248 F. 3d 877, 886, 888 (CA9 2001) (holding Nevada's procedural default rule "inadequate" because the state supreme court "exercises discretion" in capital cases). Apparently, the states of the Far West must adopt procedural default rules so mechanical that they can be programmed into a computer before they will be respected by the federal courts of the Ninth Circuit. That would be a considerable loss to the quality of justice.

If the focus were shifted to the question of whether the defendant timely invoked the proper remedy, this perverse incentive would disappear. The questions would be only whether the state had a clearly available procedure, whether the defendant invoked it, and, if not, whether the state court actually waived the default and decided his particular case on the merits instead. The existence of possible exceptions and the granting of discretionary waivers in other cases would be irrelevant.

D. Existing Exceptions.

The present doctrine of procedural default has exceptions for "cause and prejudice" and "fundamental miscarriage of justice." See *Coleman* v. *Thompson*, 501 U. S., at 748. The existence of these exceptions is somewhat difficult to reconcile with the theory that the petitioner is in prison pursuant to a state judgment that rests on adequate and independent state grounds. They are easier to fit into the exhaustion statute, although admittedly a bit of shoehorning is still required.

Congress has provided that state remedies need not be exhausted when "circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U. S. C.

§ 2254(b)(1)(A)(ii). The language was probably inspired by extreme cases such as *Moore* v. *Dempsey*, see *supra*, at 14-15, but it is expansive enough to accommodate less severe problems. An effective system of review has reasonably clear rules that tell an appellant what to file, where, and when. The burdens it imposes are not unreasonable. It does not set "springes" which trap claims without warning or for no valid purpose. See *Davis* v. *Wechsler*, 263 U. S. 22, 24 (1923); *Lee* v. *Kemna*, 534 U. S. 362, 376-378 (2002). It should have enough flexibility to grant relief despite default where the petitioner has good cause and is prejudiced, and it should certainly hear the claim of a prisoner who can prove he is actually innocent. If the state rules do not permit a hearing on the merits in these circumstances, then the process is ineffective and exhaustion is excused.

E. Summary and Application.

In summary, an exhaustion-based rule of procedural default would work this way:

1. A criminal defendant has failed to exhaust his state remedies if he does not fairly present his claims to each level of the state courts where review is available.

2. The federal claim must be "plainly and reasonably made," *Lee* v. *Kemna*, 534 U. S., at 376 (quoting *Davis* v. *Wechsler*, 263 U. S., at 24), meaning facts, argument, and authorities. The authorities must identify the claim as federal to preserve a federal claim. See *Duncan* v. *Henry*, 513 U. S. 364, 366 (1995).

3. The claim must be presented in accordance with the state's rules of procedure.

4. The only cases where a claim will be deemed exhausted despite a default are those where it clearly appears that the state court decided to excuse the default and decided solely on the merits. See *supra*, at 26.

5. Under 28 U. S. C. § 2254(b)(1)(B)(i), exhaustion is excused if the state simply has no corrective process. This should rarely, if ever, happen any more.

6. The ineffective process exception of 28 U. S. C. § 2254(b)(1)(B)(ii) applies to the following situations:

a) The state courts' enforcement of their default rule despite cause and prejudice or a compelling showing of actual innocence;

b) Rules so nebulous, or changed after the fact, that counsel cannot determine the proper procedure to preserve the claim (Justice Holmes' "springes"); or

c) Application of a rule in circumstances where it serves no legitimate state interest, which *Lee* assures us will be rare. 534 U. S., at 379-380.

In all other cases, defaulted claims will not be grounds for habeas relief. In particular, states will not be punished for allowing their courts to exercise discretion to relieve default in particularly compelling cases, nor will they be required to define with mechanical, mathematical predictability precisely what they deem to be sufficiently compelling.

Application to the present case is simple. Reese's presentation of his federal Sixth Amendment ineffective assistance of appellate counsel claim to the Oregon Court of Appeals and Supreme Court was neither "plainly and reasonably made," in the sense of *Davis* and *Lee*, nor in compliance with Oregon rules. Those courts' summary denials of relief did not waive the default. None of the circumstances excusing nonexhaustion apply. The claim must be denied.

CONCLUSION

The decision of the United States Court of Appeals for the Ninth Circuit should be reversed.

July, 2003

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation